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No. 09-1572

Supreme Court, U.S.
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In The
Supreme Court of the United States

JOSEPH STROUD and
JOVON BROADCASTING, WJYS-TV 62/34,

Petitioners,

v.

JERRI BLOUNT,

Respondent.

On Petition For Writ Of Certiorari To The Illinois Appellate Court

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Statement of the Case	1
I. The Lower Court's Approval of the Punitive Damage Award Does Not Warrant Review by This Court	7
A. In The Proceedings Below Petitioners Did Not Raise A Constitutional Challenge To Consideration of Counsel Fees In Assessing Whether A Punitive Damage Award Is Excessive	7
B. This Case Does Not Present A Conflict Warranting Review by This Court	16
II. Certiorari Is Not Warranted To Address Any of The *Noerr-Pennington* Issues Raised by The Petition	28
Conclusion	38

TABLE OF AUTHORITIES

Page

CASES:

Action Marine, Inc. v. Continental Carbon, Inc., 481 F.3d 1302 (11th Cir.2007) 21, 23

Baker v. National State Bank, 801 A.2d 1158 (N.J. Super.2002) 20

BE & K Construction Co. v. NLRB, 536 U.S. 516 (2002) 34, 35

Blount v. Stroud, 232 Ill. 2d 302 (2009) 4

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) ..... *passim*

Brandt v. Superior Court, 37 Cal. 3d 813 (1985) 24

Campbell v. State Farm Mut. Auto. Ins. Co., 98 P.3d 408 (Utah 2004) 14, 16, 17, 18

Chasan v. Farmers Group, Inc., 2009 WL 3335341 (Ariz. App. Div. 1) 18

Coker Equipment Co. v. Wittig, 366 Fed.Appx. 729 (9th Cir.2010) 22

Continental Trend Resources, Inc. v. OXY USA, Inc., 101 F.3d 634 (10th Cir.1996) 24

Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) ..... *passim*

Gallatin Fuels, Inc. v. Westchester Fire Ins. Co., 244 Fed.Appx. 424 (3d Cir.2007) 21, 22

Hall v. Cole, 412 U.S. 1 (1973) 27

Hutto v. Finney, 437 U.S. 678 (1978) 27, 28

TABLE OF AUTHORITIES – Continued

Page

International Union of Operating Engineers, Local 150 v. Lowe Excavating Co., 225 Ill. 2d 459 (2006) 8

Laymon v. Lobby House, Inc., 613 F.Supp.2d 504 (D. Del. 2009) 14, 15, 20, 22, 23

Major v. Western Home Ins. Co., 169 Cal. App. 4th 1197 (2009) 24

Parexel Int'l Corp. v. Feliciano, 2008 WL 5101642 (E.D. Pa.) 19

Quigley v. Winter, 598 F.3d 938 (8th Cir.2010) 19

St. Luke Evangelical Lutheran Church, Inc. v. Smith, 318 Md. 337, 568 A.2d 35 (Ct. App. Md. 1988) 25

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) ..... *passim*

United Mine Workers of America v. Pennington, 381 U.S. 657 (1965) 28

Willow Inn, Inc. v. Public Serv. Mut. Ins. Co., 399 F.3d 224 (3d Cir.2005) ..... *passim*

CONSTITUTIONAL PROVISIONS:

U.S. Const., amend. I ..... *passim*

STATUTES:

42 U.S.C. § 1981 ..... 2, 15, 29

42 U.S.C. § 1981a(b)(2) 15, 20

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 1988 ..... *passim*

42 U.S.C. § 1988(b) 13

RULES:

Fed. Rule Civ. Pro. 9(g) 26

Rule 14(g)(i) 7, 32

BRIEFS:

Brief of Amicus Curiae The National Association of Black Owned Broadcasters, Inc. 19, 20, 22

STATEMENT OF THE CASE

(1) Respondent Blount, an African-American woman, was employed by Jovon Broadcasting, a Chicago-area television station, from 1993 until she was terminated in 2000. Petitioner Joseph Stroud, who is African-American, owned Jovon and managed all of its operations.

In 2000 Bonnie Fouts, a white former Jovon employee, filed a charge with the EEOC alleging that while employed at Jovon she had been the victim of racial and sexual harassment, and that she had been fired because she complained about the harassment. Fouts asserted that she had been repeatedly harassed by Rick Howell, a black supervisor, who called her racial and sexual epithets such as "white bitch." (Pet. App. 5a-6a). Fouts asked Stroud on several occasions to intercede and stop the harassment, but Stroud failed to do so.

Shortly after receiving notice of Fouts' EEOC charge, Stroud called a meeting of the Jovon managers. Only African-American managers attended the meeting. At the meeting Blount indicated that she would be "supporting" Fouts in her charge of racial and sexual discrimination because she had witnessed Howell refer to Fouts numerous times as a "white bitch." Stroud admitted that he responded to Blount by stating that he did not understand "how a black person could side with a white person against a black person." (Pet. App. 7a). Stroud stated at the meeting that Fouts had placed the jobs of everyone at Jovon at

risk by filing the EEOC charge, and that there was no place for independent opinions at his company. (Pet. App. 7a).

Several days later Blount met alone with Stroud. Stroud asked Blount what she was going to say about Fouts' claims, and Blount responded that she would not lie. Stroud responded that he did not "get it," and called her an "ignorant nigger." Stroud also told her that she should not "side with" Fouts because "white people" had "done nothing for her," and because she should do what he told her to do. (Pet. App. 7a-8a). Blount in response criticized Stroud for having witnessed the harassment of Fouts and having done nothing. According to Blount, Stroud then started screaming at her and told her that she needed to know whom she was "up against," asserting that he was "one of the richest niggers in the world," and that she did not know whom she was "fucking with." Stroud also stated that he could cause Blount "to cease to exist." (Pet. App. 8a-9a).

Six days after receiving Fouts' EEOC charge, Stroud suspended Blount's employment. Shortly thereafter Stroud fired Blount. (Pet. App. 10a).

(2) In 2001 Blount commenced the instant action in Illinois state court, alleging inter alia that she had been dismissed for opposing racial discrimination. Such retaliation, Blount claimed, violated 42 U.S.C. § 1981. While that lawsuit was pending, Stroud in turn brought a separate civil action against Blount, alleging that she had surreptitiously recorded

several of their conversations. Blount testified that she had done so because she wanted proof that Stroud had told her to perjure herself and had threatened that she would "cease to exist" if she did not. Stroud's eavesdropping suit was ultimately voluntarily dismissed. (Pet. App. 11a).

Stroud also made repeated efforts to have Blount prosecuted for tape recording the conversations. Several Jovon employees filed complaints with the local police department. In addition, Stroud hired then former Illinois Attorney General Roland Burris to assist in these efforts to have Blount prosecuted. Stroud paid Burris $10,000 for his consulting services regarding how criminal charges could be filed against Blount. Stroud stated that an additional $10,000 would have been paid to Burris if these efforts were "successful." (Pet. App. 12a). Local prosecutors, however, declined to press charges against Blount.

At trial of Blount's section 1981 retaliation suit, the defendants denied that they had dismissed Blount in retaliation for her support of Fouts' EEOC charge. To support her contention that the dismissal was retaliatory in nature, Blount offered, inter alia, evidence of the repeated efforts by Stroud and several Jovon employees to have Blount prosecuted. The trial court admitted that evidence, rejecting the objections of the defendants that under the *Noerr-Pennington* doctrine it was constitutionally impermissible to rely on such evidence for the purpose of proving the motive behind the earlier termination. (Pet. App. 103a-105a). A jury found that Blount had been dismissed

by the defendants because of her actions in opposing racial discrimination against Fouts. The jury awarded Blount $257,350 in back pay, $25,000 for physical and/or emotional pain and suffering, and $2.8 million in punitive damages. The trial court subsequently awarded Blount $1,182,832.10 in attorneys' fees under section 1988. 42 U.S.C. § 1988. (Pet. App. 13a).

On appeal the Illinois Appellate Court in 2007 held that the state courts lacked subject matter jurisdiction over Blount's section 1981 claim. The Illinois Supreme Court reversed that decision, and remanded the case for consideration of the defendants' remaining contentions on appeal. *Blount v. Stroud*, 232 Ill. 2d 302 (2009). On remand the Illinois Appellate Court resolved two issues relevant to the instant petition.

(3) The Appellate Court rejected the defendants' contention that the size of the punitive damage award was so excessive that it violated their constitutional right to due process. *See State Farm Mut. Auto. Insurance Co. v. Campbell*, 538 U.S. 408, 417 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996). (Pet. App. 23-36, 73-83). In reaching that conclusion, the Appellate Court relied on the three factors identified as important by *State Farm* and *BMW*.

First, the Appellate Court concluded that

> Stroud's conduct was significantly reprehensible. Stroud's threats and attempts to use his wealth and power to silence Blount

> compound the allegations of racism and sexism underlying the case and raise it to a level of conduct warranting a significant amount of punitive damages.

(Pet. App. 78a; *see* Pet. App. 28a). The court noted that Stroud had repeatedly threatened Blount.

> Stroud ... threatened Blount, informing her that he could cause her to "cease to exist" and that she "didn't know who she was fucking with." Blount understood these comments to be threats of physical harm or threats on her life.

(Pet. App. 75a-76a). Stroud also sought to exploit the financial vulnerability of Blount and her children.

> Blount was a financially vulnerable single mother of two. Stroud knew this and sought to use her position as the sole provider for her children to persuade her to not support Fouts. Stroud told her that "Bonnie [Fouts] didn't pay your bills," that he did, and that she should do what he said so that she and her children did not "go over a cliff" financially.

(Pet. App. 76a). The petition does not challenge this aspect of the decision below.

Second, the court compared the punitive award to awards in comparable cases. It noted that punitive awards of $2.6 million had been upheld in several other section 1981 cases. (Pet. App. 81a-82a). This

portion of the Appellate Court decision is not challenged in the certiorari petition.

Third, the court compared the amount of the punitive award with the amount of "actual harm" sustained by the plaintiff. When the punitive award was compared with the combined back pay and damages, the ratio was approximately 10 to 1. (Pet. App. 79a). The court reasoned that in assessing the harm sustained by the plaintiff, it could also consider the amount of the counsel fee that had been awarded. When that fee was taken into account, the ratio was only 1.8 to 1, "well within the permissible guideline." (Pet. App. 80a). The certiorari petition relates only to this third aspect of the decision below.

(4) The Appellate Court rejected defendants' contention that it was unconstitutional to admit evidence of their efforts to persuade government officials to prosecute Blount. The defendants did not, of course, contend that the alleged retaliatory dismissal of Blount was itself constitutionally protected. Defendants argued, rather, that they had a constitutional right to attempt to have Blount prosecuted, and that the First Amendment barred plaintiff from relying on evidence about those attempts in order to prove that her dismissal was itself the result of an unlawful purpose. The Appellate Court held that the *Noerr-Pennington* doctrine does not preclude use of evidence regarding protected activity to prove "the purpose ... of the [other] transactions under scrutiny." (Pet. App. 85a (quoting *Pennington*, 381 U.S. at 670 n.3).

(5) The defendants filed a petition for rehearing, asking the Appellate Court to reconsider its initial decision. The Appellate Court subsequently issued a modified opinion, which significantly expanded its discussion of the punitive damage award and the *Noerr-Pennington* issue. (Pet. App. 1a-49a).

The defendants then filed with the Illinois Supreme Court a petition for leave to appeal. The state Supreme Court denied that motion. (Pet. App. 92a). Finally, defendants filed in the Illinois Supreme Court a motion for leave to move for reconsideration of the denial of leave to appeal. That motion too was denied. (Pet. App. 93a).

I. THE LOWER COURT'S APPROVAL OF THE PUNITIVE DAMAGE AWARD DOES NOT WARRANT REVIEW BY THIS COURT

A. In The Proceedings Below Petitioners Did Not Raise A Constitutional Challenge To Consideration of Counsel Fees In Assessing Whether A Punitive Damage Award Is Excessive

Rule 14(g)(i) of this Court requires, when review is sought of a state-court judgment, that a petitioner

> specif[y] ... when the federal questions sought to be reviewed were raised; the method or manner of raising them ... with specific reference to the places in the record where the matter appears ... , so as to show that the

> federal question was timely and properly raised....

Petitioners did not raise in the courts below the constitutional question which they now urge this Court to consider.

The issue of whether counsel fees should be considered in assessing the reasonableness of the punitive damage award arose as a result of post-trial legal developments. The Illinois Appellate Court, in its initial June 24, 2009 opinion, held that the amount of counsel fees that had been awarded to the plaintiff "may be taken into account when assessing the propriety of a punitive award." (Pet. App. 79a).[1] This issue was limited to seven sentences in the

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[1] The Appellate Court relied in part on *International Union of Operating Engineers, Local 150 v. Lowe Excavating Co.*, 225 Ill. 2d 459, 490 (2006). In *Lowe* the plaintiff had not been awarded counsel fees. The Illinois Supreme Court held that where a plaintiff had expended funds to pay counsel, but had not received an award of counsel fees, that expenditure could be considered in deciding how much in punitive damages should be awarded.

> We recognize that the $50,000 awarded here [in punitive damages] does not come close to covering the attorney fees and costs which were incurred throughout the duration of this protracted litigation. While attorney fees can be considered when awarding punitive damages, it is not within the purview of this court to award such fees outright, nor should they be awarded under the guise of a punitive damages award.

225 Ill. 2d at 491. *Lowe* did not address how the courts should deal with a situation in which, as here, there had been such a counsel fee award.

Appellate Court's lengthy analysis of the punitive damage award. (Pet. App. 79a-80a).

Defendants filed a Petition for Rehearing in the Illinois Appellate Court. That petition, however, did not argue that it would be unconstitutional to consider counsel fees in assessing the excessiveness of a punitive award. Rather, it argued only that the Appellate Court's decision rested on a misinterpretation of the particular provision of federal law, 42 U.S.C. § 1988, under which counsel fees had been awarded in this case.

> The Court included attorneys' fees as compensatory damages in the *Gore-Campbell* ratio, overlooking the clearly established law that attorneys' fees awarded pursuant to 42 U.S.C. § 1988 are not compensatory damages. This Court's holding is directly contrary to the plain language of Section 1988 and established precedent, both of which provide that Section 1988 attorney's fees are costs of litigation and not compensatory damages.[2]

The section of defendants' Petition for Rehearing devoted to this issue was headed "Attorneys' Fees Awarded Pursuant to Section 1988 Are Not Compensatory Damages For Purposes Of The Proportionality Ratio."[3] Defendants' argument concerned the proper construction of section 1988, and relied primarily on

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[2] Appellants' Petition for Rehearing, at 1; *see id.* at 4-9.

[3] *Id.* at 4.

decisions interpreting section 1988 as well as "the plain language of the statute and ... congressional intent."[4] Correctly understood, defendants argued, an award of counsel fees under section 1988 was actually "a component of punitive damages.... [A]ttorneys' fees ... should have been added to the punitive side, not the compensatory side .... [which] would result in a ratio of 16:1."[5]

The Appellate Court in its initial decision had relied in part on the Third Circuit decision in *Willow Inn, Inc. v. Public Serv. Mut. Ins. Co.*, 399 F.3d 224 (3d Cir.2005), which had considered an attorneys' fee award under a Pennsylvania statute in upholding the punitive award in that case. (Pet. App. 79a). Defendants did not assert that the reasoning in *Willow Inn* was constitutionally unsound, but instead distinguished *Willow Inn* on the ground that the counsel fee statute in that case was different than section 1988.

> [T]he Third Circuit agreed to include attorneys' fees awarded pursuant to Section 8371 of the Pennsylvania Code as part of the compensatory damages in the *Gore-Campbell* ratio because Pennsylvania courts had held the statute made the fee award a portion of compensatory damages, as a matter of state law.... In contrast to the fees awarded under the Pennsylvania statute in *Willow Inn*, fees

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[4] *Id.* at 6.

[5] *Id.* at 8.

> awarded under Section 1988 are not compensatory.

Nothing in the Petition for Rehearing suggested, as defendants now contend, that *any* inclusion of counsel fees in an excessiveness analysis would be constitutionally impermissible.

In response to the Petition for Rehearing, the Appellate Court issued a modified opinion on October 6, 2009; that opinion included a substantially more detailed discussion of the relevance of counsel fees. (Pet. App. 31a-34a). The new portions of the state court opinion were addressed to the non-constitutional arguments that had been raised in the petition. First, the Appellate Court rejected defendants' suggestion that counsel fee awards under section 1988 should be treated as a form of punitive damages.

> In their petition for rehearing, defendants ... contend that attorney fees should have been counted in the punitive side of the *Gore* compensatory-punitive damage ratio. They assert that this is because the purpose of attorney fees under section 1988 is to punish defendants for wrongful conduct. We disagree. Contrary to defendants' assertions, section 1988 is "remedial" in nature; it is not punitive.

(Pet. App. 31a). Second, the Appellate Court refused to distinguish the Third Circuit decision in *Willow Inn*, reasoning that the Pennsylvania counsel fee

statute at issue in that case served "similar goals" to the purposes of section 1988. (Pet. App. 31a-32a).

Defendants filed a Petition for Leave to Appeal with the Supreme Court of Illinois. The issue which defendants asked the state Supreme Court to decide was whether "[t]he appellate court's decision ignored the language of 42 U.S.C. § 1988, which explicitly provides that attorneys' fees are costs of litigation."[6] This petition argued that a counsel fee award under section 1988 "should have been" treated as punitive damages.[7] Defendants insisted that *Willow Inn* was distinguishable because the Pennsylvania counsel fee statute in that case had been held to be "compensatory damages as a matter of state law,"[8] an argument which necessarily assumed that how counsel fees should be considered turned on the construction of the statute authorizing such awards. The asserted defect in the Appellate Court's analysis, defendants insisted, was that it was "[c]ontrary to the clear congressional mandate" in enacting section 1988.[9] After leave to appeal was denied, defendants filed a Motion for Reconsideration, raising the same non-constitutional argument regarding the interpretation of section 1988. "[I]t was error to treat attorneys' fees awarded under Section 1988 as compensatory

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[6] Petition for Leave to Appeal of Joseph Stroud and Jovon Broadcasting, WJYS-TV 62/34, at 4.

[7] *Id.* 8.

[8] *Id.* at 12 n.1.

[9] *Id.* at 12.

damages. Section 1988 provides for 'a reasonable attorney's fee *as part of the costs*.' *See* 42 U.S.C. § 1988(b) (emphasis added)."[10]

In April 2010, in a Motion to Recall and Stay Issuance of Mandate, filed in the Appellate Court, defendants described the federal question it intended to raise in its then contemplated certiorari petition in the same, statute-specific terms.

> [T]his court ... choos[e] ... to include the award of $ 1,182,832 in attorneys' fees as compensatory damages for purposes of a due process analysis.... Contrary to the court's ruling, the plain language of § 1988 makes clear that "a reasonable attorney's fee [is] *part of costs*," not damages. 42 U.S.C. § 1988(b) (emphasis added).[11]

In its Application for An Extension of Time filed in this Court in April 2010, defendants used the identical language to describe the federal question that the petition would present.[12] The actual certiorari petition

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[10] Motion of Joseph Stroud and Jovon Broadcasting for Reconsideration of the Order Denying Their Petition for Leave to Appeal, at 6; *see id.* at 6-7.

[11] Motion to Recall and Stay Issuance of Mandate Pending Determination of Petition for Writ of Certiorari by The United States Supreme Court, at 3.

[12] Application for An Extension of Time to File Petition for Writ of Certiorari to the Appellate Court of Illinois To and Including June 25, 2010, at 5.

filed only two months later, however, framed a very different question.

In sum, the only federal issue raised by defendants in the litigation below concerned a question of statutory interpretation – whether a counsel fee award under section 1988 (like a fee award under the Pennsylvania statute at issue in *Willow Inn*) should be treated as a form of compensatory damages in assessing the excessiveness of a punitive damage award. None of the briefs filed by defendants in the state courts concerning this issue asserted that it would be unconstitutional to construe or apply section 1988 in that manner. In this Court, for the first time, defendants contend that it would violate substantive due process to consider *any* counsel fee award in assessing whether or not a punitive damage award is excessive. But defendants did not fairly raise any such contention in the courts below.

The petition filed in this Court relies heavily on the Utah Supreme Court decision in *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 419 (Utah 2004); *see* Pet. at 10, 11, 18, 19. But in the proceedings below defendants never referred to *Campbell*. Defendants in this Court insist that "[m]any state and federal trial courts have reached the same conclusion [as *Campbell*]." (Pet. 18-19 n.8). But, with a single exception, defendants never cited any of these cases in their briefs in the Illinois courts. The solitary exception highlights the change in defendants' position. In a single footnote in one brief below defendants mentioned *Laymon v. Lobby House*,

Inc., 613 F.Supp.2d 504 (D. Del. 2009), but they cited that decision as important because (unlike, for example, *Willow Run*), it was "decided under Section 1981."[13] Disavowing the statute-specific approach which they took in the lower courts, defendants no longer distinguish the Third Circuit *Willow Run* as an interpretation of a different counsel fee statute, but now denounce *Willow Run* as constitutionally unsound. (Pet. 20, 22).

The constitutional issue which defendants seek to raise in this Court was not aired in the courts below. In this Court defendants insist that the decision below "*directly* conflicts with decisions of ... this Court" (Pet. 19) (emphasis in original), quoting assertedly controlling passages in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582 (1996), and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003). (Pet. 17-18). Because defendants failed to advance this argument in the courts below, the state courts had no opportunity to address it. Defendants contend in this Court that if counsel fees could be considered in assessing the excessiveness of punitive awards, there would be a grave danger of manipulation (Pet. 10, 15); because that argument was not made in the courts below, the Illinois courts

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[13] Appellants' Petition for Rehearing, at 9 n.3. *Laymon* is actually a Title VII sexual harassment case, not a section 1981 case. The relevant portion of the opinion refers to the damages provision of Title VII, which is codified in 42 U.S.C. § 1981a(b)(2). 613 F.Supp.2d at 515.

had no opportunity to assess that contention in light of their own practical experience, or to consider what safeguards might be fashioned to address any such problems. Defendants insist that the circumstances of the instant case are an example of the type of "artificially inflated" counsel fee award that was concocted to provide support for extravagant punitive awards. (Pet. 15-16 n.7). Again, however, the lower courts never were asked to consider that fact-bound contention.

B. This Case Does Not Present A Conflict Warranting Review by This Court

This case does not present the sort of clear, well-established and fully aired conflict that warrants review by this Court. A close reading of the cases relied on by petitioners makes clear that they do not concern a single constitutional issue, but instead involve a number of different non-constitutional and constitutional questions, each of which has so far arisen in only a handful of cases. The decisions relied on by petitioners present a range of different questions, not as petitioners suggest an "array of approaches" to a single constitutional issue. (Pet. 22).

(1) Petitioners contend that the decision in the instant case conflicts with the Utah decision in *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409 (Utah 2004), on remand from this Court's decision in *State Farm*. But *Campbell* is too opaque and

isolated to establish the sort of conflict that would warrant review by this Court.

Campbell did not offer any analysis of the constitutional issue raised by the petition; it merely construed this Court's mandate in *State Farm* itself to require the lower courts on remand in that particular case to use as the denominator in the *BMW/State Farm* analysis the particular jury award in that case.[14] The six-year old decision in *Campbell* remains an isolated result which apparently has not been applied even in Utah. *Campbell's* discussion of counsel fees and punitive damages appears to have been cited on only a single occasion, in an unreported Arizona decision which actually rejected the per se

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[14] 98 P.3d at 419:

> Finally, we turn to the Campbells' claim that costs and attorneys fees incurred in this action, as well as the excess portion of the verdict not covered by insurance, should be included as part of the denominator in calculating a ratio between compensatory and punitive damages. We disagree.
>
> We believe that fairly read, the Supreme Court's opinion forecloses consideration of a compensatory damages number other than the $1,000,000 awarded by the jury.... [T]he considerable attention given by the Supreme Court to ... the methodology for arriving at a constitutionally permissible ratio of compensatory to punitive damages convinces us that we would not be at liberty to consider a substitute denominator.

(Paragraph numbering omitted). Petitioners do not claim that the exclusion of the excess portion of the verdict not covered by insurance, although arguably dictated the mandate of this Court, was constitutionally required.

rule urged by petitioners.[15] The failure of other courts to follow *Campbell* may well stem from the fact that it is unclear what constitutional rule was adopted by the Utah Supreme Court.[16]

Campbell expressed a concern that considering counsel fees when assessing the excessiveness of a punitive award "would substantially alter the manner in which trials are conducted in this state." 98 P.3d at 420. Whatever the Utah-specific nature of those concerns, no other state court has followed this reasoning. *Campbell* predicted that considering counsel fees in assessing the excessiveness of punitive awards would "invite[] unnecessary conceptual and practical complications to an already complex enterprise." *Id.*

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[15] A keycite search for Headnote 11 in *Campbell* identifies only five cases, four of which have nothing to do with the issue in this case. The only relevant decision, *Chasan v. Farmers Group, Inc.*, 2009 WL 3335341 at *10-11 (Ariz. App. Div. 1), held that counsel fees could be considered in assessing the excessiveness of a punitive award if the fees were actually part of the damages awarded by the jury or court.

[16] The first paragraph of the Utah court's opinion recites that it feels bound by the fact that this Court's earlier opinion, in describing the ration of damages to punitive damages, had referred only to the amount awarded by the jury. 98 P.3d at 419-20. Although that might be read to bar consideration of a post-trial award of fees by a court, this reasoning would not address a case in which a jury awarded counsel fees, which a number of states authorize in certain types of cases.

The Utah court also objected on administrative grounds to authorizing juries to make such awards. 98 P.3d at 420. But nothing in the opinion suggests that there would be a constitutional bar to considering such jury awards.

Petitioners do not assert that such intractable administrative problems have in fact arisen; the absence to date of such judicial experience counsels against addressing this issue at this point.

Petitioners also identify two unpublished district court decisions which have disapproved consideration of counsel fees in evaluating the excessiveness of punitive awards. (Pet. 18-19 n.8). District court decisions, of course, do not provide the sort of inter-circuit conflict that might warrant review by this Court. The cursory nature of those decisions, moreover, illustrates the need for far more consideration of this issue by the lower courts.[17]

Petitioners' Amicus asserts that the Eighth Circuit decision in *Quigley v. Winter*, 598 F.3d 938 (8th Cir.2010), held "that attorneys' fees cannot be included as compensatory damages for purposes of calculating the ratio."[18] That is not correct. The opinion in *Quigley* never discussed whether as a matter of constitutional law such fees can be regarded as a form of compensation in the *BMW/State Farm* analysis.[19] The brief for the plaintiff in *Quigley* did not

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[17] In *Parexel Int'l Corp. v. Feliciano*, 2008 WL 5101642 * 6 (E.D. Pa.), for example, the entire discussion is nine words long. "[T]he Court disagrees with the Plaintiff's use of attorney's fees."

[18] Brief of Amicus Curiae The National Association of Black Owned Broadcasters, Inc., at 3.

[19] The amicus elsewhere asserts only that "[if] the Eighth Circuit had included attorneys' fees as compensatory damages ... , it

(Continued on following page)

argue that the counsel fee in that case should be considered in assessing the excessiveness of the punitive award.[20]

(2) A number of the cases which petitioners describe as adopting per se rules for, or against, consideration of counsel fee awards in fact turn on interpretations of particular statutes, and decided only whether a counsel fee awarded under a specific statute should be deemed compensatory in nature. Many of those opinions do not undertake to decide any distinct question of constitutional law.

Baker v. National State Bank, 801 A.2d 1158 (N.J. Super.2002), declined to consider a particular fee award because the New Jersey Law Against Discrimination "specifically includes attorneys fees under a separate section [from the damages provision]." 801 A.2d at 1168 (citing N.J.S.A. 10:5-27.1). *Laymon v. Lobby House, Inc.*, 613 F.Supp.2d 504 (D. Del. 2009), reasoned that it would be improper to consider fee awards in assessing a punitive damage award under Title VII because of the particular definition of compensatory damages provided in a Title VII case. 613 F.Supp.2d at 515 (citing 42 U.S.C. § 1981a(b)(2)). Neither of these cases held that, had

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would have reinstated the entire ... punitive damages awarded." *Id.* at 6. But the Eighth Circuit did not consider counsel fees in this regard, not because it found such consideration would be unconstitutional, but because the plaintiff never asked the court to do so.

[20] Brief of Appellant-Cross-Appellee, 2009 WL 462577.

the statutes authorized treating fee awards as part of compensatory damages, it would have been unconstitutional to do so.

Conversely, the Third Circuit decision in *Willow Inn, Inc. v. Public Service Mut. Ins. Co.*, 399 F.3d 224 (3d Cir.2005), does not hold that it is always proper to consider counsel fee awards when assessing the excessiveness of a punitive award. Rather, *Willow Inn* determined only that such consideration was permissible under a particular Pennsylvania statute regarding bad faith denials of insurance benefits. 399 F.3d at 229 (citing 42 Pa. Cons. St. § 8371), 235 (relying on purpose and language of section 8371). *Willow Inn* relied heavily on a Pennsylvania state court decision which had held that "§ 8371 attorneys fees and costs awards are to be considered compensatory damages." 399 F.3d at 421. *Gallatin Fuels, Inc. v. Westchester Fire Ins. Co.*, 244 Fed.Appx. 424, 437 (3d Cir.2007), is based on an interpretation of the same Pennsylvania statute. *Action Marine, Inc. v. Continental Carbon, Inc.*, 481 F.3d 1302 (11th Cir.2007), considered the counsel fee award in that particular case in the *BMW/State Farm* comparison because

> [i]n Georgia, awards of attorney fees in tort cases involving bad faith are compensatory in nature. *See* O.G.C.A. § 13-6-11 (2006 Supp.), *City of Warner Robbins v. Holt*, 220 Ga. App. 794, 470 S.E.2d 238, 240 (1996) (holding that the purpose of an award of attorney fees and litigation expenses "is to compensate an injured party....")

481 F.3d at 1321 (footnote omitted). None of these opinions purports to decide any constitutional question raised by applying the statutes at issue in this manner.[21]

These two groups of decisions do not conflict; they simply involved interpretations of different statutes. *Laymon*, for example, did not disagree with the decisions in *Willow Inn* and *Gallatin Fuels*, but distinguished them on the ground that they involved a different statute than the provision of Title VII that was the basis of the fee award in *Laymon* itself.

> *Gallatin Fuels* ... and *Willow Inn* ... involve breach of contract and bad faith claims against insurers under 42 Pa.C.S.A. § 8371

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[21] Petitioners' Amicus describes the Ninth Circuit decision in *Coker Equipment Co. v. Wittig*, 366 Fed.Appx. 729 (9th Cir.2010), as holding that attorneys' fees and costs can be "included as compensatory damages for purposes of calculating the ratio." Brief of Amicus Curiae The National Association of Black Owned Broadcasters, Inc., at 4.

But the defendant in *Coker* did not argue that it would be unconstitutional to consider counsel fees in assessing the excessiveness of a punitive award. The defendant's somewhat cursory brief on this issue simply assumed that under Nevada law, which governed that diversity case, counsel fees in an abuse of process case would not be treated as damages. Appellant Coker Equipment Co., Inc's Opening Brief, 2008 WL 5070038 at *28-*30. The Ninth Circuit construed Nevada law to treat fees and costs as part of compensatory damages in an abuse of process case. 366 Fed.Appx. at 733. The defendant in *Coker* never argued that a Nevada law treating fees and costs in this manner could not constitutionally be applied in assessing the excessiveness of a punitive damage award.

> and not Title VII.... The holdings in *Willow Inn* and *Gallatin Fuels* do not address damages in cases of intentional discrimination in employment.

613 F.Supp.2d at 515.

In the instant case the Appellate Court concluded that counsel fee awards under the statute at issue here – section 1988 – should (like the statutes in *Willow Inn* and *Action Marine*) be considered in the *BMW/State Farm* calculus. Petitioners do not suggest that there is an inter-circuit conflict regarding the interpretation of section 1988, and do not contend that certiorari would be warranted merely to construe that particular statutory provision.

(3) Other cases cited by petitioners do not involve court awarded fees at all.

In some states the compensatory damages awarded for certain torts may include an amount for counsel fees. That typically occurs where the underlying tort by its nature is likely to cause the plaintiff to incur counsel fees, and counsel fees are regarded as a foreseeable item of damages just as medical fees would be in a personal injury case.

> This is true in actions for false arrest and malicious prosecution, where damages may include attorney's fees incurred to obtain release from confinement or dismissal of the unjustified charges ... or to defend the prior suit.

Brandt v. Superior Court, 37 Cal. 3d 813, 818 (1985). Where the damage award in such cases includes counsel fees, the lower courts unsurprisingly have assumed that the entire damage award should be considered in the *BMW/State Farm* analysis. *Major v. Western Home Ins. Co.*, 169 Cal. App. 4th 1197, 1224 (2009). (*See* Pet. 21). That issue, of course, is not presented by the instant case.[22]

In *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634 (10th Cir.1996), the Tenth Circuit considered yet another issue, whether in a case in which neither the jury nor the judge has awarded counsel fees, a plaintiff's uncompensated legal expenses can be considered in the *BMW* analysis.

> [P]laintiffs' legal costs no doubt exceeded their compensatory damages award. Nothing in *BMW* would appear to prohibit consideration of the cost of those legal proceedings in determining the constitutionally permissible limits on the punitive damages award.

101 F.3d at 642. That constitutional issue, whatever its merits, also is not presented by the instant case, because here – unlike *Continental Trend* – there was in fact a counsel fee award.

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[22] Petitioners correctly note that the issue in this case is limited to the constitutionality of "inclu[ding] ... court-awarded attorneys' fees as compensatory damages for purposes of calculating the ratio of punitive to compensatory relief." (Pet. 9).

St. Luke Evangelical Lutheran Church, Inc. v. Smith, 318 Md. 337, 568 A.2d 35 (Ct. App. Md. 1988), which predates both *BMW* and *State Farm*, involved a distinct non-constitutional issue. (*See* Pet. 22). There was no counsel fee award in that case at all, and the punitive award was actually smaller than the award of compensatory damages. The question decided in *St. Luke* was whether under Maryland law, with regard to a claim for which an award of counsel fees was not permitted, a jury in determining the size of a punitive award could consider evidence regarding non-reimbursed legal expenses incurred by the plaintiff. That circumstance obviously is not presented here, because in the instant case there was a counsel fee award and because evidence of the plaintiff's legal expenses was never presented to the jury.

(4) Petitioners argue that the decision below conflicts with this Court's decisions in *BMW* and *State Farm*, and is inconsistent as well with a number of other decisions of this Court. That is not correct.

Petitioners rely on a passage in *BMW* in which the Court "compared the punitive damages award to the amount of 'actual harm *as determined by the jury*.' *BMW*, 517 U.S. at 582 (emphasis added)." (Pet. 17). But if this standard, in isolation, established the constitutional standard, it would preclude consideration of compensatory damages awarded by a judge after a bench trial, a result that would effectively bar punitive damages except when a case was tried before a jury. Obviously *BMW* did not establish such a rule,

just as it did not resolve whether and when fee awards could be treated as compensatory for purposes of the *BMW/State Farm* analysis, because neither of those issues was before the Court in *BMW*.[23]

Petitioners also rely on a passage in *State Farm* noting that "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to *the general damages recovered.*" (Pet. 17, quoting *State Farm*, 538 U.S. at 426) (emphasis added by petition). But *State Farm* does not address, for example, whether the "harm to the plaintiff" could include money actually expended by a plaintiff to hire an attorney and pay costs (or a debt incurred by the plaintiff to an attorney). If the *BMW/State Farm* analysis was limited to "the general damages recovered," it would not include special damages, (*see* Fed. Rule Civ. Pro. 9(g)), or compensatory damages that a plaintiff had been awarded but was unable to collect. This Court's decision in *State Farm* cannot fairly be read as encompassing either such constitutional rule.

Petitioners also contend that

> [A]ttorneys' fees may properly be viewed as punitive in nature. In examining statutes that shift a prevailing party's fees such as the one at issue here, the Court has observed

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[23] There is no indication in the opinion of this Court or the Supreme Court of Alabama that attorneys' fees had been awarded in this case.

> that "the underlying rationale of 'fee shifting' is, of course, punitive." *Hall v. Cole*, 412 U.S. 1, 5 (1973); *see also, e.g., Hutto v. Finney*, 437 U.S. 678, 691 & n.17 (1978).

(Pet. 17). That is not an accurate description of the decisions in *Hall* and *Hutto*. *Hall* emphatically did not involve a counsel fee statute, and it did not hold that fee shifting under such statutes is punitive in purpose. The quoted passage actually refers only to non-statutory counsel fees awarded because of the misconduct of a party.

> [F]ederal courts in the exercise of their equitable powers ... may award attorneys' fees when the interest of justice so require.... Thus, it is unquestioned that a federal court may award counsel fees to a successful party where his opponent has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." 6 J. Moore, Federal Practice 54.77(2), p. 1709 (2d ed. 1972).... In this class of cases, the underlying rationale of "fee shifting" is, of course, punitive, and the essential element in triggering the award of fees is therefore the existence of "bad faith" on the part of the unsuccessful litigant.

412 U.S. at 4-5. Petitioners' quotation from *Hall* omits the key qualifying words "[i]n this class of cases," which refer to (as punitive) only the limited class of cases in which fees are awarded to punish bad faith or vexatious litigation tactics. Similarly, the

counsel fee award referred to in *Hutto* was not based on any statute.[24] Rather, that decision applied "the settled rule that a losing litigant's bad faith may justify an allowance of fees to the prevailing party." 437 U.S. at 689 (footnote omitted); *see* 437 U.S. at 691 ("In this case, the award of attorney's fees for bad faith served the same purpose as a remedial fine for civil contempt.")

II. CERTIORARI IS NOT WARRANTED TO ADDRESS ANY OF THE *NOERR-PENNINGTON* ISSUES RAISED BY THE PETITION

(1) The *Noerr*[25]*-Pennington* evidentiary issue actually litigated in the courts below has already been resolved by this Court's decision in *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965); no compelling reason exists to revisit an issue that has been settled law for decades.

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[24] The portion of *Hutto* referred to by petitioners concerned a fee award of $20,000 based on misconduct by the defendants' counsel in the district court. 437 U.S. at 689-93.

A separate portion of *Hutto* discussed an award of $2500 in counsel fees for work done in the court of appeals. That award was made under 42 U.S.C. § 1988, was not based on bad faith, and was not characterized by the Court as punitive in nature. 437 U.S. at 695-700. This Court instead described the counsel fee award under section 1988 as "*compensating* a successful litigant for the expense of his suit." 437 U.S. at 697 n.27 (emphasis added).

[25] *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

The only cause of action for retaliation asserted in this case was that the defendants had violated section 1981 when they dismissed Blount in reprisal for her having opposed racial discrimination. Petitioners do not contend that the dismissal of Blount for opposing racial discrimination was constitutionally protected action under the *Noerr-Pennington* doctrine. Nor could they plausibly do so. The dismissal of a private employee obviously is not a form of petitioning for redress of grievances.

The actions which petitioners do contend enjoyed protection under the First Amendment occurred only *after* the plaintiff had been dismissed. But plaintiff is not asserting a cause of action for injuries suffered when the defendants attempted to persuade state officials to prosecute her. Blount is not arguing that those efforts were actionable under any federal or state law, or constituted some form of common law tort. The plaintiff did not seek or win any damages for injuries that she might have suffered as a result of those post-termination actions by the defendants.

In the trial of her section 1981 retaliation claim, plaintiff sought to prove that the defendants dismissed her in 2000 because she had opposed racial discrimination against another employee. To support that allegation that there was such a retaliatory motive behind her dismissal, Blount claimed that the defendants remained angry about her opposition to discrimination even after she was fired, and for that reason had in 2001 and 2002 attempted to persuade state officials to prosecute the plaintiff. The

constitutional argument raised by petitioners in the litigation below was that the *Noerr-Pennington* doctrine operates as an absolute bar to use of such evidence to prove the existence of an unlawful motive was behind the earlier dismissal.[26] *Pennington* itself, however, addressed that very issue.

> It would of course still be within the province of the trial judge to admit [evidence of protected activity], if he deemed it probative and not unduly prejudicial, under the "established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny."

United Mine Workers of America v. Pennington, 381 U.S. 657, 670 n.3 (1965) (quoting *Federal Trade Comm'n v. Cement Institute*, 333 U.S. 683, 705 (1948)).

Petitioners acknowledge that there is no conflict among the lower courts regarding whether the *Noerr-Pennington* doctrine permits the introduction of such evidence to establish the motive behind concededly non-protected action. (Pet. 13) ("this rationale does not create a conflict of authority"). Petitioners do not assert that practical experience has demonstrated that application of the rule in footnote 3 in *Pennington* has proven unworkable, or that the rule has been

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[26] *See* pp. 32-33 at n.27, *infra*.

undermined by subsequent decisions of this Court. Footnote 3 is consistent with well established First Amendment principles. The First Amendment, for example, clearly protects the rights of a white supervisor to join the Ku Klux Klan; but if that same supervisor were alleged to have discriminated against a Black, Jewish or Catholic job applicant, his membership in the Klan would assuredly be admissible evidence.

This case presents a singularly inappropriate vehicle for revisiting this issue. During the trial Stroud himself, "during his examination by his own counsel ... stated that the judge who presided over his civil eavesdropping suit told him that he should contact the authorities to bring a criminal claim." (Pet. App. 38a). The court below correctly held that Stroud could not complain about testimony "elicited by defendants' counsel." (Pet. App. 39a). By first introducing evidence regarding Stroud's efforts to have Blount prosecuted, the defendants themselves opened the door to plaintiff's subsequent introduction of additional evidence – less favorable to the defendants – about those efforts.

(2) Even if evidence of otherwise protected activity is not constitutionally inadmissible, petitioners now argue, the courts should admit such evidence "only upon a *heightened showing* that its probative value outweighs the chilling effect on constitutional rights." (Pet. 34-35) (emphasis added). The decision of the Appellate Court below, petitioners argue, applied the "wrong" legal standard when it failed to require

such a heightened showing. (Pet. 34) ("the legal standard applied below is wrong").

But in the courts below the petitioners never argued that the application of any such "heightened showing" requirement was constitutionally required. To the contrary, petitioners repeatedly insisted instead only that the First Amendment precluded the state courts from admitting this evidence under any circumstances.[27] Notwithstanding Rule 14(g)(i) of this

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[27] Defendants' Reply In Support of Their Post-Trial Motion for Judgment Notwithstanding the Verdict, New Trial, and/or Remittitur, at 14:

> Mr. Stroud's pursuit of his legal remedies against Plaintiff ... is protected by the Petition Clause of the First Amendment and the *Noerr-Pennington* doctrine. Accordingly ... this Court erred in permitting Plaintiff to use these acts to support her claims in this case.

Brief of the Defendant-Appellants, Joseph Stroud and Jovon Broadcasting, WJYS-TV 62/34, at 33:

> Stroud's pursuit of his legal rights against Plaintiff ... is protected conduct under the Petition Clause of the First Amendment and the *Noerr-Pennington* doctrine.... The Circuit Court erred in permitting Plaintiff's use of Defendant Stroud's lawful acts to support her claims....

Reply Brief of the Defendant-Appellants, Joseph Stroud and Jovon Broadcasting, WJYS-TV 62/34, at 15:

> Mr. Stroud's pursuit of his legal remedies against Plaintiff ... is protected by the Petition Clause of the First Amendment and the *Noerr-Pennington* doctrine and accordingly, ... the trial court erred in permitting Plaintiff to sue these acts to support her claims of retaliatory animus.

(Continued on following page)

Court, petitioners do not contend that they ever advanced this "heightened standard" constitutional argument in the Illinois courts.

(3) Petitioners insist that the Appellate Court "ruled that *Noerr-Pennington* does not apply here because Stroud's petitioning of criminal law enforcement authorities had ended before the trial in this case." (Pet. 29; *see* Pet. 9 ("[t]he court ... held that *Noerr-Pennington* was inapplicable here because Stroud's efforts to obtain redress through the criminal

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Petition for Leave to Appeal of Joseph Stroud and Jovon Broadcasting, WJYS-TV 62/34 at 16:

> [T]he First Amendment not only guarantees Mr. Stroud's access to the courts, it guarantees that his genuine petitioning will not be used against him at a later date.

Motion of Joseph Stroud and Jovon Broadcasting for Reconsideration of the Order Denying Their Petition for Leave to Appeal, at 3-5:

> A citizen cannot be penalized for exercising his or her First Amendment rights. The appellate court's decision does just that. Mr. Stroud's lawful, proper, and meritorious efforts to obtain redress against Ms. Blount ... were used against him as evidence of retaliatory intent.... The appellate court thought it relevant that Ms. Blount did not sue Mr. Stroud directly for his petitioning activities, but instead used his lawful conduct as evidence of intent to retaliate. That is a distinction without a difference.

Motion to Recall and Stay Issuance of Mandate Pending Determination of Petition for Writ of Certiorari by the United States Supreme Court, at 3-4 (admission of evidence error because the petitioning activity was "privileged under the First Amendment").

justice system had already ceased at the time of trial"); Pet. 12 (same)). Petitioners contend that under the decision below the *Noerr-Pennington* doctrine never applies once the petitioning activity has come to a close.

The petition rests this characterization of the decision below on several excerpts from that opinion.

> The court reasoned that Respondent's introduction of evidence relating to past petitioning could not "thwart the right to seek redress in the court system or through the criminal justice system" because "the State's Attorney [had already] decided that there were no grounds to charge Blount criminally." Pet. App. 43a.... Indeed, the court stated (incorrectly) that "[t]he *Noerr Pennington* doctrine is usually raised as a defense where one party seeks to enjoin another from bringing a suit. Thus, when the part to be enjoined has had his day in court, those concerns are no longer present." *Id.* at 42a....

(Pet. 29-30). This asserted decision limiting *Noerr-Pennington* to efforts to interfere with ongoing petitioning, petitioners argue, conflicts with this Court's decision in *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002) (Pet. 30), and with lower court decisions that hold that *Noerr-Pennington* applies

to "activity that already has come to a close." (Pet. 30).[28]

But petitioners' selective editing of the opinion below omits the key sentence between these two quoted excerpts, in which the Appellate Court expressly does recognize that the *Noerr-Pennington* doctrine can indeed apply to completed petitioning, and which cites *BE & K Construction* for that very rule. "[T]he doctrine may also be applied where a party contends that another party's completed lawsuit is unlawful. *BE & K Construction*, 536 U.S. at 527." (Pet. App. 42a-43a). And the very next (omitted) sentence after the excerpt quoted by petitioners explains that the *Noerr-Pennington* doctrine does not apply here precisely because "Blount does not claim that Stroud's actions in petitioning were unlawful." (Pet. App. 43a).

Petitioners assert that several of this Court's *Noerr-Pennington* cases should be characterized as involving a form of retaliation. (Pet. 26). But the Illinois Appellate Court recognized that the *Noerr-Pennington* doctrine does generally apply in cases (including retaliation cases) involving labor law or business and economic interests. (Pet. App. 40a-41a).

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[28] Pet. 12:

> [T]hat ruling directly conflicts with decisions of this Court and the courts of appeals, which have repeatedly applied *Noerr-Pennington* to completed acts of petitioning.

All of the decisions of this Court relied on by petitioner fall within the categories to which the court below would apply the *Noerr-Pennington* doctrine, and all of those decisions were cited and accepted by that court. Nothing in the decision below suggests that the Appellate Court would refuse to apply the *Noerr-Pennington* doctrine in similar cases.

(4) Petitioner objects that under the reasoning of the court below the *Noerr-Pennington* doctrine would not be applied to a state common law retaliation action which (unlike the instant case) sought damages for petitioning activity that did not involve labor relations or economic interests. (Pet. App. 42a). But neither the decision below not petitioners suggest that there is in fact any such common law action for retaliation under Illinois law.

The plaintiff did not assert that she had a state law cause of action arising out of the defendants' efforts to have her prosecuted. Rather, the only retaliatory act which plaintiff asserted was unlawful, and for which she obtained damages, was her dismissal in violation of section 1981. Defendants have never claimed that that dismissal was itself protected by the *Noerr-Pennington* doctrine. The decision below properly concludes that the *Noerr-Pennington* doctrine is inapplicable to the retaliatory dismissal of the plaintiff, which occurred prior to any activity which the defendants assert is protected by the First Amendment; petitioners do not dispute the correctness of that holding.

The instant case thus does not provide an appropriate vehicle for resolving a hypothetical dispute about the application of dicta in the decision below to some other situation. Regardless of what types of retaliatory acts might be protected by the *Noerr-Pennington* doctrine, and regardless of how the decision below may in the future be construed or applied in other cases, in this case there is simply no claim that the retaliatory dismissal of this plaintiff was itself protected activity under the First Amendment. Certiorari is particularly unwarranted because the dicta to which petitioners object is in the decision of an intermediate appellate court, and would thus be subject to reconsideration by the state Supreme Court should a case ever arise in which that portion of the opinion was outcome-determinative.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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